UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

REPLY IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

K.A.D. Camara
Joe Sibley
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield
Brant D. Penney
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

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REPLY IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

Our argument is simple: (1) MediaSentry violated state and federal laws to obtain evidence against Jammie Thomas; (2) the RIAA's lawyers, including Matthew Oppenheim and opposing counsel in this case, developed, directed, and ratified MediaSentry's illegal gathering of evidence in violation of the rules of professional conduct; (3) this Court has "inherent authority" — power derived directly from what it means to be an Article III court — to remedy this misconduct by suppressing evidence; and (4) taking into account the severely punitive nature of the statutory damages that Plaintiffs seek and the unprecedented breadth of their litigation campaign in the federal courts nationwide, this Court should exercise its authority to suppress the illegally and unethically collected MediaSentry evidence.

We file this reply to correct the most egregious of the many misstatements of fact and law that comprise Plaintiffs' response to our motion to suppress. We begin with a list of undisputed facts:

1. On February 21, 2005, MediaSentry, using packet-sniffing technology to contemporaneously capture TCP/IP packets, recorded in a log on their hard disk the information contained in the TCP/IP packets exchanged between their machine and Jammie Thomas's machine.

2. On February 21, 2005, during their interaction with Jammie Thomas's machine located in Minnesota, MediaSentry's agents were operating from a state other than Minnesota.

3. Plaintiffs, through the RIAA, paid MediaSentry to investigate potential defendants like Jammie Thomas and, in particular, to collect evidence for civil lawsuits against such defendants.

4. Plaintiffs' attorneys, including Matthew Oppenheim and opposing counsel in this case, developed, directed, and ratified the manner in which MediaSentry's conducted these investigations.

The only dispute is over the legal effect of these facts.

ASSERTION AND REPLY

I. THIS COURT HAS DISCRETION TO SUPPRESS ILLEGALLY AND UNETHICALLY OBTAINED EVIDENCE.

A. The exclusionary rule does not apply in this case. R. at 16.

R. True.

We do not seek, and have never sought, suppression of evidence under the exclusionary rule. The exclusionary rule does not apply in a civil case because its purpose is to deter police and government officials from engaging in unconstitutional behavior. *See United States v. Janis*, 428 U.S. 433 (1976).

We rely instead on the privacy afforded individuals by a complex of federal statutes that includes the Pen Register Act, the Wiretap Act, and the Electronic Stored Communications Act. *See generally* Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 Nw. U. L. Rev. 607 (2003).

We rely, moreover, on the rules of conduct that govern members of our profession and the inherent power of this Court, as a duly constituted and fully empowered Article III court, to enforce these rules of conduct and thereby protect the integrity of the judicial process.

A. A federal district court cannot exclude evidence based on investigative and attorney misconduct such as that which occurred in this case. R. at 18–19.

R. False.

All federal courts have the power to control proceedings in the interest of ensuring that federal process is just. This power, which has been described as the "inherent power," derives from Article III of the Constitution:

> I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to "the Judicial Power," U.S. Const. art. III § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.

Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting); *see also id.* at 46–51 (majority opinion). The inherent power prevents the unmanning of a court in the face of conduct that challenges the integrity of federal process.

A court may remedy abuse of process through its inherent power by imposing remedies up to and including dismissal of a case. *See id.* at 44 ("A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a lawsuit, which we upheld in *Link*, is a particularly severe sanction, yet is within the court's discretion."); *United States v. Smiley*, 553 F.3d 1137, 1142 (8th Cir. 2009) (recognizing district court's inherent power and citing *Chambers*); *Lamb Engineering & Construction Co. v. Nebraska Public Power District*, 103 F.3d 1422, 1434–37 (8th Cir. 1997) (same).

District courts have often used their inherent power to suppress evidence obtained in violation of the ethical rules governing lawyers. The United States District Court for the District of Delaware, for example, suppressed all evidence collected by Fish & Richardson's questioning of an employee of a defendant in a patent-infringement case where they knew that the defendant was represented by counsel. Judge Robinson explained:

> [T]he violation of the Model Rules must be recognized and deterrence enforced through the imposition of a sanction. Therefore, . . . plaintiff may not use the fruits of F & R's conduct, that is, plaintiff's expert, Mr. Chang, may not serve as a consultant or expert witness in this litigation, nor may the two F & R lawyers who oversaw the installation be involved in the litigation, nor may the information be given to any other witness for use in this litigation.

Microsoft Corp. v. Alcatel Business Systems, No. 07-090-SLR, 2007 WL 4480632 at *1–*2 (D. Del. 2007). Because the inherent power stems directly from the Constitution, exercising it to suppress evidence is consistent with Rule 402. *Cf. Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1316 (3d Cir. 1993) ("The ethical standards imposed upon attorneys in federal court are a matter of federal law.").

Similarly, when Dickie Scruggs paid $150,000 per year to material witnesses in the Katrina insurance litigation in violation of the ethical rule forbidding investigation by this means, the United States District Court for the Southern District of Mississippi suppressed the evidence that he had collected. *See McIntosh v. State Farm Fire & Casualty Co.*, No. 1:06C-cv-1080-LTS-RHW, 2008 WL 941640 at *3 (S.D. Miss. 2008). Judge Senter expressly rested his decision to exclude their testimony on Scruggs's having violated the ethical rule regarding payment of material witnesses, even citing a Mississippi State Bar Ethics Committee opinion on point. *See id.* at *2. *See also Hammond v. City of Junction City*, 167 F. Supp. 2d 1271, 1293 (D. Kan. 2001) (suppressing unethically obtained evidence); *Cagguila v. Wyeth Labs, Inc.*, 127 F.R.D. 653, 654–55 (E.D. Pa. 1989) (same).

The First, Third, and Seventh Circuits have expressly recognized district courts' discretion to suppress unethically obtained evidence. *See United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980) ("The district court [has] inherent authority to supervise the professional conduct of attorneys appearing before it. As a general rule, the exercise of this authority is committed to the sound discretion of the district court."); *Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc.*, 440 F.2d 1216, 1219 (7th Cir. 1971) ("the desirability of deterring improper investigative conduct was a factor which the court could properly consider in the exercise of its discretion to exclude the evidence"); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 440 (1st Cir. 1991) ("Insofar as Orlando appears to have acted improperly in obtaining the statement as counsel for Borges, such impropriety in the means of obtaining a statement would not automatically bar admission of the statement at trial. There is no exclusionary rule in civil cases. If the issue were raised, the decision whether to exclude the evidence would be in the district court's discretion.").

There can be no serious question that this Court has power to suppress the MediaSentry evidence. It must therefore exercise its discretion one way or the other; the decision whether to admit this evidence "is committed to the sound discretion of the trial court." *Miller*, 624 F.2d at 1201. The relevance of the criminal acts committed by MediaSentry is that, in directing, supervising, and ratifying these acts, the RIAA's lawyers, including opposing counsel in this case, violated their ethical obligations not to obtain evidence in violation of the legal rights of others. This ethical violation is the predicate for our motion to suppress.

A. *Aiken, Ford,* and *O'Brien* do not support suppression. R. at 17–18.

R. False.

Like the cases cited in this reply, *Aiken* and *Ford,* two of the authorities cited in our motion, both expressly recognize that ethical rules govern attorneys in federal court and that suppression of evidence is an appropriate sanction. *Aiken v. Business and Indus. Health Group*, 885 F. Supp. 1474 (D. Kan. 1995); *State v. Ford*, 539 N.W. 2d 214 (Minn. 1995). O'Brien demonstrates a state court that used its inherent authority to exclude evidence obtained in violation of wiretap laws, even where such wiretap laws did not directly require exclusion of the evidence. *O'Brien v. O'Brien,* 899 So. 2d 1133, 1137 (Fla. App. 2005). ("The trial court found that the electronic communications were illegally intercepted in violation of the Act and ordered that they not be admitted in evidence. Generally, the admission of evidence is a matter within the sound discretion of the trial court."). We note that that Minnesota's wiretap laws, unlike Florida's, do require exclusion of illegally obtained evidence. Minn. Stat. § 626A.11 (2005).

II. THE RIAA'S INVESTIGATION VIOLATED THE MINNESOTA PRIVATE DETECTIVES ACT

A. MediaSentry's activities could not have violated the Detective Act because MediaSentry was not physically located in Minnesota. R. at 5–6.

R. False.

MediaSentry's investigation of transmissions from Jammie's computer in Minnesota and their tracking of those transmissions to Jammie's computer in Minnesota were sufficient to subject them to the Detectives Act even though they were located outside Minnesota. "A person may be convicted and sentenced under the law of this state if the person: . . . being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state." Minn. Stat. § 609.025. The Attorney General of Minnesota regards this statute as applicable to Internet-based criminal activity that originates outside Minnesota. *See* Marc L. Caden & Stephanie E. Lucas, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 Rich. J. L. & Tech. 3, 84 (1996) (*citing* http://www.state.mn.us/ebranch/ag/memo.txt, *now available at* http:// www.interesting-people.org/archives/interesting-people/199511/msg00038.html).

Neither MediaSentry nor Plaintiffs have disclosed the location of MediaSentry's activities in February 2005. Media reports in 2005 indicate that

MediaSentry most likely conducted its activities from either New Jersey or Maryland. Both New Jersey and Maryland have private investigator and wiretap statutes that MediaSentry would have violated if it conducted its activities from these states. *See* N.J. Stat. §§ 45:19, 2A:156A-2; Md. Code, Business Occupations & Professions § 13-801; Md. Code, Courts & Judicial Proceedings § 10-402. Of course, it is no defense to liability under the Minnesota Private Detectives Act that MediaSentry's activities were also crimes under the law of other jurisdictions. "It is not a defense that the defendant's conduct is also a criminal offense under the laws of another state or of the United States." Minn. Stat. § 609.025.

A. MediaSentry's work is not the "business of a private detective" under the Detectives Act. R. at 6.

R. False.

There can be no serious question that what MediaSentry did is the "business of a private detective" under the Detectives Act.

> Persons who for a fee, reward, or other consideration, undertake any of the following acts for the purpose of obtaining information for others are considered to be engaged in the business of a private detective: . . .
>
> (1) investigating the identity, habits, conduct, movements, whereabouts, transactions, reputation, or character of any person or organization;
>
> (3) investigating the credibility of witnesses or other persons; . . .
>
> (8) obtaining through investigation evidence to be used before any authorized investigating committee, board of award, board of arbitration, administrative body, or officer in preparation for trial of civil or criminal cases.

Minn. Stat. § 326.338.

MediaSentry's conduct falls within this provision because, for a fee, it investigated the identity, conduct, whereabouts, transactions, and character of Jammie Thomas, investigated her credibility as a witness, and obtained through investigation evidence to be used in preparation for the civil trial in this case. MediaSentry also violated § 626.3381 by holding itself out as a private detective without a license to do so. These acts were gross misdemeanors under Minnesota law. Minn. Stat. § 326.3381. The comprehensive competency requirements for a private detective's license that Plaintiffs point out, R. at 6, including many hours of investigative training in a professional or law-enforcement organization, support our conclusion that the Detectives Act reflects a serious intent by the Minnesota legislature to comprehensively regulate private investigation. *Cf. State v. Horner*, 617 N.W.2d 789 (Minn. 2000).

A. MediaSentry did not violate the Detectives Act because the information that it gathered was public information. R. at 6.

R. False.

First, as explained in Part III, *infra*, the evidence that MediaSentry collected was not public information. No ordinary member of the public could have collected this information; doing so required arcane technical skills and special computer programs, packet sniffers and the like, to translate bits flowing over a cable into information about a defendant, Jammie Thomas. Moreover, collecting "private information" as opposed to "public information" is not a requirement for violation of the Detectives Act; unlicensed detective work such as collecting evidence for a civil trial violates the Detectives Act, whether the evidence collected is public or private.

A. Because Defendant lacks standing to enforce the Detectives Act — i.e., because she is not a Minnesota district attorney — she cannot argue that MediaSentry violated the Detectives Act. R. at 6.

R. False.

This assertion is absurd. Defendant is not suing MediaSentry or plaintiffs under the Detectives Act. But whether or not Defendant is a prosecutor, she is entitled to point out that what MediaSentry did was illegal and that, consequently, the RIAA's lawyers, who directed and supervised MediaSentry, were collecting evidence in violation of Jammie Thomas's legal rights and were therefore acting in violation of the rules of professional conduct.

A. *TNT Road Co v. Sterling Truck Corp.* supports Plaintiffs' position that evidence gathered without a license should not be suppressed. R. at 7.

R. False.

The district court in *TNT Road Co. v. Sterling Truck Corp.*, No. 03-37-B-K, 2004 WL 1626248 (D. Me. 2004), held that a person who qualified as an expert witness in investigation but who was not licensed as a private investigator should be admitted where that person had investigated a vehicle fire in accordance with industry standards. In other words, the Maine court found that the lack of a license, standing alone, would not preclude the investigator's expert testimony. Other courts have taken the opposite position. *See Donegal Mutual Insurance Co.*

v. White Consolidate Industries, 795 N.E.2d 133, 134 (Ohio App. 2003) ("a trial court abuses its discretion when it permits, over objection, the expert testimony of an unlicensed fire inspector as to the cause of a fire"); *McKeegan v. Sears, Roebuck & Co.*, 1995 WL 527441 at *3–*4 (Ohio App. 1995); *Pennsylvania Lumbermens Insurance Corp. v. Landmark Electric, Inc.*, No. C.A. 13882 1993 WL 541644 at *2–*5 (Ohio App. 1993). The weight of authority on the admission of expert testimony from unlicensed investigators weighs in favor of exclusion.

TNT is inapplicable for a more fundamental reason, however: it addressed a *Daubert*-style objection under Rule 702, not an argument for suppression to preserve the integrity of federal process under the inherent power, as we urge in this case. The issue both in *TNT* and in the many other cases reaching the opposite result is whether an expert should be excluded because, although an expert, he is unlicensed. It has nothing to do with the appropriate remedy for lawyers who direct a campaign to procure evidence illegally then seek to introduce that evidence in a civil case. Moreover, to the extent *TNT* even arguably applies, that court admitted the testimony of the unlicensed investigator because he was offered as an expert; here, MediaSentry is not offered as an expert witness.

At a more practical level, the kind of *ex post* investigation of an accident that was at issue in *TNT* is very different from the broad sweeps of data from the computers of private citizens that MediaSentry engaged in. Inadvertent file sharing — the inadvertent disclosure of sensitive private information like the avionics of Marine One or Justice Breyer's investment portfolio — is a major problem. *See* M. Eric Johnson *et al.*, *Why File Sharing Networks Are Dangerous*, 52:2 Communications of the ACM 134 (2009). States have an entirely legitimate interest in preventing widespread evidence gathering by private parties that would allow them to stumble on information like this unwittingly made available by innocent citizens.

III. THE RIAA'S INVESTIGATION VIOLATED THE WIRETAP ACT

A. The Wiretap Act does not prohibit the interception of a communication when one of the parties consents. R. at 12–13.

R. False.

The Wiretap Act specifically prohibits wiretaps even with the consent of one party where the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). *See also Sussman v. American Broadcasting Companies, Inc.*, 186 F.3d 1200 (9th. Cir 1999) (noting exception to single-party consent where purpose of tap is criminal or tortious act); *U.S. v. Lam*, 271 F. Supp. 2d 1182 (N.D. Cal. 2003) (recordings bookie made of his own phone calls for the criminal purpose of keeping records of his gambling operation held to violate Wiretap Act).

A. It is absurd to suggest that MediaSentry intercepted the electronic communications for the purpose of committing a criminal or tortious act. R. at 13.

R. False.

MediaSentry intercepted electronic communications for the purpose of investigating Jammie Thomas (and tens of thousands of others like her) without a private-detective license to do so in Minnesota or anywhere else. To make this more explicit: having been engaged by the RIAA and its lawyers to hunt down suspected copyright infringers online in preparation for civil trials against them, MediaSentry tapped the electronic communications between itself and Jammie Thomas. The purpose of this tapping was to fulfill its contract with the RIAA to provide investigation services, a contract that was a criminal violation of the Detectives Act. Thus, the purpose of the tapping was criminal.

A. MediaSentry accessed electronic communications on a system configured to be readily accessible to the general public; accordingly, it did not violate the Wiretap Act. R. at 14.

R. False.

Plaintiffs misquote the law in their memorandum. Plaintiffs write the exception in 18 U.S.C. § 2511(2)(g)(i) as: "it shall not be unlawful to 'access an electronic communication made through a [computer] that is configured so that such electronic communication is readily accessible to the general public.'" In fact, the statute does not refer to a "computer." It reads:

> It shall not be unlawful . . . to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

18 U.S.C. § 2511(2)(g)(i). An electronic communication system is not a computer. It is defined:

> "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.

18 U.S.C. § 2510(14).

It changes the statute to substitute *computer* for *electronic communications system*. An electronic communications system is something like the Internet, not Jammie's computer (although such a system may include those parts of Jammie's computer related to transmission and temporary storage of such communications in transit). MediaSentry used a "packet sniffer" to intercept the electronic communications — TCP/IP packets — flowing between their computer and Jammies. A packet sniffer intercepts electronic communications in an analogous manner to that in which a traditional wiretap intercepts wire signals.

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ILLEGAL:

             phone line

Person A  ________________ Person B

          |

       wiretap


ILLEGAL:

             Internet

Machine A  ________________ Machine B

          |

       packet sniffer
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A packet sniffer is a wiretap device that plugs into computer networks and eavesdrops on the network traffic. It can be a program running on an ordinary computer; it can also be a piece of specialized equipment. Like a telephone wiretap that allows the FBI to listen in on other people's conversations, a sniffer lets someone listen in on computer conversations. Computer conversations, as intercepted by the sniffer, consist of apparently random strings of binary data — strings of 0's and 1's. Packet-sniffer systems therefore include a "protocol analysis" function, which allows them to decode the computer traffic — to see what it means according to the protocol, or language, in which it is encoded, in the case of the Internet, TCP/IP — and make sense of it. MediaSentry's printouts are examples of the output of a packet sniffer with protocol analysis.

The Internet is an electronic communications system. At the level of TCP/IP packet communications (as opposed to at the level of web browsers that translate such communications into human-readable form), the Internet is not readily accessible to the general public. *See Konop v. Hawaiian Arilines, Inc.*, 236 F.3d 1035 (9th Cir. 2001) (Internet should be treated analogously to other communication networks: "We believe that Congress intended the ECPA to eliminate distinctions between protection of private communications based on arbitrary features of the technology used for transmission."); Douglas C. Sicker, Paul Ohm, Dirk Grunwald, *Legal Issues Surrounding Monitoring During Network Research*, Proceedings of the 7th ACM SIGCOMM Conference on Internet Measurement 141–48 (October 24–26, 2007) (discussing legal issues involved with packet sniffers and failing to identify § 2511(2)(g)(i) as a legal exception that would exempt packet sniffing).

The communications system at the TCP/IP level requires special expertise to access. *See, e.g.,* Craig Hunt, TCP/IP Network Administration (2d Ed. 1998); Mark S. Burgess, Principles of Network and System Administration (2000). This is why the RIAA and its lawyers engaged MediaSentry in the first place: they needed to break into the Internet at this level (rather than at the publicly accessible level of web browsers and the like) in order to decrypt the TCP/IP packets flowing between MediaSentry's computer and Jammie's. An ordinary person could not have done this because the Internet is not designed for ordinary people to listen in on such packet transmissions. And it is no defense to say that MediaSentry merely recorded data (TCP/IP packets) sent to it. Packets on arrival but before conversion to human-readable form are protected and may not be tapped, just like a tap in the receiver of a phone is no less objectionable than a tap on the main line. *See United States v. Councilman*, 418 F.3d 67, 79 (1st Cir. 2005).

If this Court holds otherwise, the Internet will have no protection under the wiretap laws: any party could intercept TCP/IP packets — the packets that transmit all data over the Internet — without regard for legal consequences. To see only one absurd consequence of this rule, consider voice over IP (VOIP), the technology used for Internet telephone calls on systems like Skype or Vonage. If Plaintiffs are right, then ordinary phone calls would be protected, but VOIP calls would not. Ordinary mail would be protected, but email would not. "It makes no more sense that a private message expressed in a digitized voice recording stored in a voice mailbox should be protected from interception, but the same words expressed in an e-mail stored in an electronic post office pending delivery should not." *Konop*, 236 F.3d at 1046. This was not what Congress intended when it added "electronic communications" to the Wiretap Act in 1986.

Without reaching the question whether information conveyed through the KaZaA screen interface is readily accessible to the general public — we contend it is not and have briefed this issue fully in our original motion — this Court need not decide. The raw data that flows through the nerves of the modern Internet certainly is not.

WHY THIS COURT SHOULD EXERCISE ITS DISCRETION TO SUPPRESS THE EVIDENCE COLLECTED BY MEDIA SENTRY

The RIAA's litigation campaign against those who download music online is part of a broader legal strategy designed to convince the public that its members own the sound recordings at issue in these cases. As we will explain in our coming submission on the work-made-for-hire issue, these recordings were not works made for hire and, accordingly, the recording industry will face a problem as artists and musicians claim their statutory right to cancel assignments and exclusive licenses after a 35-year period. In 2013, artists and musicians will begin challenging the recording industry over that industry's core asset — the ownership of sound recordings. They will ask courts to return ownership of sound recordings to their creators pursuant to the Copyright Act. The recording industry has known of this coming conflict for years. And it is terrified.

More than five years ago, the RIAA began a litigation campaign designed to frighten ordinary citizens into settling claims for copyright infringement. The basis for the allegation of copyright infringement in each of the more than 35,000 such demands was evidence collected by MediaSentry at the direction and under the supervision of the RIAA's lawyers in violation of state detective acts like the Minnesota Private Detectives Act and the whole complex of federal statutes governing online privacy, including the Wiretap Act. The purpose of this campaign was, indeed, to protect what the RIAA and its members see as their intellectual property. What is objectionable is not this purpose, but the abusive means by which the RIAA has pursued that purpose.

Because the statutory damages permitted by the Copyright Act amount to hundreds or thousands of times the actual damages — $150,000 per song that sells for $1.29 on iTunes without DRM — tens of thousands of people, confronted with the overwhelming display of attorneys, evidence, and experts deployed by the recording industry and faced with the prospect of protracted and expensive federal litigation without the assistance of counsel followed by a ruinous judgment, have capitulated en masse. This is the only case to reach the jury-trial phase of federal judicial process — and one of the few where the legitimacy of what the RIAA is doing is being actively litigated.

The RIAA seeks to bend justice with money. They use their power to force artists and musicians to accept contracts of adhesion that purport to turn independent creators into employees of industry. They use their power to sue their customers, using illegal methods to obtain evidence, bringing suits premised on uncertain standing, and offering small but substantial settlements offset against potentially devastating federal litigation to ensure that everyone capitulates. Many of these issues are not judicial. They call for resolution through the market or through a legislature; through an action on behalf of the public brought by the Department of Justice; or perhaps for regulation by some other agency of the modern executive. But the issue we raise here is judicial.

This Court has precedent and procedure and the inherent power, recognized by the Eighth Circuit and the Supreme Court as conferred directly by Article III, to suppress the illegally and unethically obtained evidence that is the basis of the RIAA's prosecution against Jammie Thomas. It is not for a court to solve the broader problems of the recording industry or of those it targets; but it is eminently for this Court and for the judiciary as a whole to ensure that when these problems take the form of civil actions, federal process is not abused. Having called attention to the illegal, unethical, and fragile basis for the RIAA's claims against Jammie, we call on this Court to exercise its discretion to exclude the evidence on which these claims are based.

We respectfully request that our motion to suppress the MediaSentry evidence be granted.

Respectfully submitted,

/s/ K.A.D. Camara

K.A.D. Camara
Joe Sibley
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield, #209855
Brant D. Penney, #0316878
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

Dated: June 9, 2009